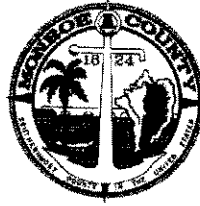


# County of Monroe


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## MEMORANDUM

TO: Board of County Commissioners

FROM: Timothy J. McGarry, AICP  
Director of Growth Management 

DATE: April 29, 2005

SUBJECT: **Public Hearing on Comprehensive Package of Amendments  
to the Comprehensive Plan and Land Development Regulations  
for Implementation of Goal 105 – Tier System**

## INTRODUCTION

### Overview

At its March 17, 2005, public hearing and workshop, the Board agreed that each individual Commissioner would send comments and suggestions [contained in April agenda package] on the Tier System to the Growth Management Division for review and analysis. Based on these comments and suggestions and Board and staff dialogue at the March public hearing, the staff was directed to prepare recommended options for further revisions to the proposed Tier System for consideration by the Board at its April 20, 2005, public hearing.

On April 20, the Board continued the public hearing until 1:30 p.m., May 17, 2005, in Key Largo. Since that public hearing, the staff has further refined and revised its recommended options to the proposed Tier System.

### Purpose

The purpose of this memorandum is to provide a framework for conducting the public hearing(s) on the proposed ordinances by providing specific recommendations and options for further revisions to the draft ordinances in a structured manner that will facilitate the Board's decision making on this complex set of ordinances. As addenda to this memorandum, the staff's responses

to Commissioner's comments and suggestions and a staff evaluation of Mr. Ed Swift's requested changes to the Tier System are present in Attachment A and B respectively.

### **Public Hearing Procedures and Outcome**

The staff is requesting that all the ordinances, including the transmittal resolutions be heard concurrently, except for the ordinance approving the Tier Overlay District Map, be held concurrently. The ordinance approving the Tier Overlay District Map will be held after the first six ordinances are heard.

The staff is requesting that the public be allowed to speak before the staff presentation to the Board on the ordinances. No staff presentation is proposed on the Tier Overlay District Map.

In the its presentation, the staff will go over each set of recommendations and options with the Board . It is the staff's intention for the Board to make a decision on each of these remaining policy issues at the May 17, 2005, public hearing. Based on the Board's direction, the staff will make necessary changes to the draft ordinances amending the Comprehensive Plan and Land Development Regulations.

The staff intends to come back to the Board with final draft ordinances at the June 15 or 16, 2005, public hearing. Due to the length of these hearings, the staff is recommending that the June public hearing be scheduled for 9:00 a.m. on June 16, following the regularly scheduled Commission meeting on June 15.

At the June public hearing, the Board will be asked to give its approval of the two resolutions for transmittal of the two ordinances amending the Comprehensive Plan to DCA for review and comment. None of the ordinances amending either the Comprehensive Plan or the Land Development Regulations, including the Tier Overlay District Map, will be adopted until after DCA has reviewed and commented upon the draft amendments to the Comprehensive Plan.

### **TIER SYSTEM RECOMMENDATIONS, OPTIONS AND DECISIONS**

This section has been structured to facilitate the key decisions that the Board has to make on the remaining outstanding issues regarding the finalization of the proposed amendments to the Comprehensive Plan and Land Development Regulations. To that end, the staff has grouped the key decisions needed to be made by issue area based on the Board's discussion at the March 17 meeting and written comments provided to the Growth Management Division subsequent to that meeting. Additionally, the staff has added two new issues with recommendations that have come to the staff's attention since the March and April meetings.

Not included in this memorandum are any issues or provisions in the ordinances on which the Board has not voiced disagreement, such as the proposed limitation on the number of

administrative relief awards. However, should any Board member believe that further discussion is necessary, the Commissioner needs to bring the issue to the Board's attention at the May meeting.

### **Issues from March Meeting**

#### **Increasing Federal and State Legal and Financial Involvement**

*Background:* At the March 17, 2005, public hearing, the Board raised concerns about the mandates being placed on the County by the Federal and State governments without sufficient funding. More importantly, the Board voiced its unanimous concern with the general unwillingness of the Federal and State government to fully participate in the legal defense in the "taking claims" and sharing in the cost of this defense resulting from the County implementing these mandates. The Board directed staff to prepare an amendment to the Comprehensive Plan that memorializes the Board's position on this significant issue.

*Proposed Revision:* Amend the Comprehensive Plan by creating Policy 6 that states the policy of Monroe County to use its full powers and resources through its Federal and State representatives and courts of competent jurisdiction to bring the Federal and State governments in as a "third party" and full participant in any litigation arising from County actions to implement the mandates of the Florida Keys Carrying Capacity as set forth by the Florida Administration Commission in this Comprehensive Plan and Federal Endangered Species Act.

*Staff Recommendation:* The staff recommends approval of the proposed revision.

*Board Decision:* \_\_\_\_\_

#### **Tier I Points**

*Background:* At the March 17, 2005, public hearing, the Growth Management Division's Special Legal Counsel indicated his concerns about the point differential between Tier I and III properties. He stated that the differential of 30 points may be too excessive as applicants could claim that without significant investment it would be fruitless to enter into ROGO, which they may argue is a de facto "taking". The current ROGO scoring system, where applicants can receive significant negative points, has given the County Special Legal Counsel's concerns.

The issue in addressing points is directly related to balancing property rights with public objectives for environmental and habitat protection. Therefore, any increase in points to address property rights issues ("takings claims"), must be carefully weighed against the ramifications for undermining the protection of environmentally sensitive habitat and protected species and public policies to direct development to infill areas.

A directly related issue has to do with the Tier System's stated objectives in simplifying the current regulatory system and making it more transparent for property owners. However, if

layer upon layer of scoring modifications are needed to be applied to correct problems with the classification of properties into three tiers, the system becomes more complex and less transparent.

*Options:*

1. *Retain the existing assignment of 0 points to Tier I under ROGO.*

**Pro-** Retaining the existing assignment of “0” points makes it more difficult for development in Tier I and ensures significant mitigation in the form of land dedication. In addition, it addresses the issues of “buffers” and “secondary impacts”, which are not addressed in the current system, but need to be addressed as recommended in the Florida Keys Carrying Capacity Study. In many cases, properties that currently receive a significant number of negative points due to the presence of several protected species will be more competitive, further reducing potential “takings claims”.

**Con-** Although some Tier I properties may benefit from the new point system, compared to the existing ROGO point system, other properties which have less existing upland native habitat and/or lack the presence of endangered species would be more adversely affected. Concerns have been raised that retaining the significant point differential may be considered a de facto “taking” for these properties as they would make prohibitive to be developed.

2. *Assign +10 points to Tier I under ROGO.*

**Pro-** An increase in points assigned to Tier I would make it less difficult to be awarded an allocation to receive a permit for development, which reduces the County’s liability to potential takings claims; however, it will still require the property owner to dedicate at least 5 lots to be on par with Tier III properties. [Note: For Big Pine Key and No Name Key only a 20 point differential exists between Tier I and III designations.]

**Con-** The application of +10 points increases the likelihood for development in Tier I of many properties that are now heavily penalized by the presence of protected species and upland native habitat. This impact on the proposed system makes it a less satisfactory than the currently proposed assignment of “0” points in meeting the minimization and mitigation (dedication of lots) requirements of the Tier System. A question that is still difficult to answer is whether or not the need to dedicate five lots to be on par with Tier III properties (estimated to cost at least \$150,000) is cost prohibitive, excluding many property owners from getting a permit.

3. *Assign +10 points to Tier I under ROGO, but place a cap on the number of allocations that can be awarded in Tier I to 6 (3 in Upper Keys and 3 in Lower Keys).*

**Pro-** This option has the same advantages as those for Option 2, but the cap placed on the number of allocations would more satisfactorily achieve the minimization and mitigation requirements than Option 2. A similar cap exists on the number of allocations in Tier I for Big Pine Key and No Name Key.

**Con-** The disadvantages of this option are the same to those for Option 2, but are further minimized by the caps placed on the number of allocation awards in Tier I.

4. *Assign +10 points to any application in Tier I under ROGO, but apply -10 points to any application that proposes development within a habitat of a protected species (i.e., endangered/threatened and State protected) as depicted on the County's Endangered and Threatened Plant and Animal Maps and Florida Keys Carrying Capacity Maps.*

**Pro-** The assignment of -10 points to any application proposing development within a habitat of a protected species addresses the problem that results from increasing the points for all Tier I properties to +10. Under the current system, these properties are heavily penalized as negative points are cumulatively assigned based on the number of endangered/threatened species and quality of native upland habitat. Even with the assigning of +10 points these properties will still be more competitive than under the current ROGO system; however these negative points ensure that such properties will provide more mitigation than required for other Tier I properties that lack these indicators. It will further erode the case for making claims that may be made under the current ROGO system, which assigns a significant number of negative points to these properties. It should be further noted that the presence of protected species is a very good surrogate for the presence of the native habitat that needs to be protected.

**Con-** This option does not penalize some properties enough and makes it still too easy to obtain an allocation in Tier I.

*Staff Recommendation:* The staff recommends **Option 4:**

*Board Decision:* \_\_\_\_\_

## Tier II Points

*Background:* At the March 17<sup>th</sup> public hearing, a significant amount of discussion concerned the scoring of Tier II properties in ROGO. The consensus of the Board was that the proposed scoring differential of 10 points was too severe; therefore, retaining this point differential is not an option under consideration. The scoring for Tier II needs to appropriately support the objectives and policies of Comprehensive Plan Goal 105 and more equitably and fairly reflect the real environmental and policy differences between Tier II and III designated properties.

### *Options:*

1. *Assign +30 points to both Tier I and II under ROGO.*

**Pro-** The elimination of the point difference between the two designations will reduce much of the opposition to the Tier II designations and simplify the system. Development in Tier II will be further restricted through application of stricter clearance standards than Tier III.

**Con-** The elimination of the point differential would be inconsistent with Goal 105, as it would further encourage development outside of infill subdivisions. In addition it would benefit many properties that would receive negative points under the current system due to habitat; therefore, it does not appropriately support the mitigation and minimization requirements of the Tier system. It will the County to retain and revise the current HEI. This option is not likely to be supported by DCA as indicated in the testimony of the DCA representative at the April public hearing.

2. *Assign +20 points to Tier II under ROGO, but expand vesting by awarding current applications in Tier II that have received a +1 point for habitat +30 points. [Note this option may be combined with other ones.]*

**Pro-** This option provides an equitable solution for those property owners that made their investment decisions based on the existing system rules.

**Con-** The option doesn't comprehensively address the policy issue concerning the point differential between Tier II and III designated properties that have been cited by Commissioners and staff and ignores the fact of new upland habitat growth in these areas.

3. *Assign +30 points Tier II under ROGO, but apply a -5 points to those Tier II applications that propose to clear 2,500 square feet or more of upland native habitat.*

**Pro-** This option addresses the concerns raised about encouraging development in upland native habitat inconsistent with the mitigation and minimization requirements of the Tier System that has led to appeals of permits by DCA and a Notice of Violation. [The assignment of -5 points is the deduction made under the current regulations for a moderate quality habitat.]

**Con-** The downside to this option is that it treats the majority of Tier II lots similar to Tier III, which is inconsistent with Comprehensive Plan Goal 105 in that it encourages development outside of infill (Tier III) subdivisions.

4. *Assign +26 points to Tier II under ROGO.*

**Pro-** This option more appropriately and equitably recognizes the differences between Tier II and Tier III properties than the current point differential, but at the same time makes Tier III properties more desirable for development, consistent with Comprehensive Plan Goal 105.

**Con-** The only downside is that all Tier II properties are treated equally even those with upland native habitat that must be cleared, which works against mitigation and minimization requirements of the Tier System.

5. *Assign +26 points to Tier II under ROGO, but apply -5 points to applications proposing to clear 2,500 square feet or more of upland native habitat. [Revision of option presented to Board at the March 17<sup>th</sup> public hearing.]*

**Pro-** This option improves on Option 4 by not treating all Tier II properties equally in that only properties with upland native habitat that propose significant clearing are penalized, which is more consistent with the mitigation and minimization requirements of the Tier System than Option 2.

**Con-** This option makes administration of the Tier System slightly more complicated. It automatically assumes that a “moderate quality” upland native habitat exists on any property requiring clearing of more than 2,500 square feet, which may not be fair and equitable for all situations.

*Staff Recommendation:* The staff recommends **Option 5** as the preferred option: assign +26 points to Tier II, but apply a -5 points to applications proposing to clear 2,500 square feet or more of upland native habitat. As its second choice, the staff recommends **Option 4**: assign +26 points to Tier II. [Note: After further analysis conducted since the March public hearing, the staff is no longer in a position to support **Option 3**, as it assigns the same ROGO point value to both Tier II and Tier III.]

*Board Decision:* \_\_\_\_\_

## Lottery

*Background:* At the March 17<sup>th</sup> meeting, the staff received no clear direction from the Board concerning the lottery, although subsequently it did receive written comments from one Commissioner opposing the lottery. The County Special Legal Counsel did point out that a lottery may serve a valuable legal purpose in defense of “takings claims” by providing an additional avenue for applicants to obtain a permit. The proposed amendments to the Comprehensive Plan would authorize, but not require the Board to establish both a lottery and competitive system.

As proposed, the lottery would only be available for market rate applicants and not for allocations in Big Pine Key and No Name Key. To be eligible, the application must meet the minimum number of points assigned to Tier III properties (i.e., +30); and must be the only application entered into ROGO by an individual, entity or organization. Under the proposed system, an initial of 20 percent (24 allocations) of the market rate allocations would be available; the Board may annually adjust up or down the previous year’s allocation available for the lottery by 50 percent. The minimum share of allocation for the lottery would be 20 percent of the total market rate allocations with no maximum limits placed on the lottery’s share of these allocations.

The decisions that the Commission must make regarding the lottery include 1) whether or not to make a lottery available; 2) eligibility and conditions for Tier I properties in the lottery system; 3) and limits and share of the market rate allocations to be made available to the lottery system.

### Retain the lottery.

**Pro-** The lottery alternative provides an avenue for households that lack the financial resources to compete in the market system, but are not eligible for an affordable housing allocation or not in a position to accept the conditions placed on affordable housing allocations. The system is not intended for developers or individuals who need certainty in the planning of their future residences. It provides an additional legal defense in countering “takings claims”.

**Con-** A lottery creates some uncertainty in the development process for individuals, where certainty is desired. It creates additional administrative burden and cost by requiring the County to maintain two separate allocation systems. The lottery may be subject to abuse in that developers and contractors may employ individuals to “front” for their applications.

*Staff Recommendation:* The staff recommends that the Board support a dual lottery and competitive system.



*Board Decision:* \_\_\_\_\_

*Keep Tier I properties eligible for lottery as proposed.*

**Pro-** The eligibility for Tier I applications in the lottery system provides an additional protection for the County against “takings claims”, as applicants have the opportunity to secure an allocation award with less points than under the competitive system, if the cost to enter the lottery system are not cost prohibitive, which is an issue –see cons. (The staff believes it may well take at least two additional lot dedications above the +30 point threshold for applications to be successful in the competitive system.)

**Con-** Being eligible for the lottery may make property owners less likely to sell their properties to the public increasing the potential for development of environmentally sensitive lands and increasing the acquisition costs of these properties. If the +30 point threshold is retained to be eligible, it will reduce the effectiveness of this option to “takings claims” and it is questionable that applicants with the necessary financial resources would really make use of the lottery option rather than the competitive system based on the marginal difference in relative costs involved.

Even if the point differential between Tier I and III were reduced as proposed under the scoring option for Tier I, applicants with less financial resources may make the claim that the requirement to add 20 additional points (i.e., dedicating at least 5 lots to the County) to be eligible for the lottery at additional cost of \$150,000 is prohibitive and effectively excludes them from developing their property. Of course whether or not these costs are actually prohibitive in terms of the high price Keys market can not be known until tested in court.

Any option to make it less costly for Tier I properties to be eligible for the lottery, must carefully balance the “property rights” objectives of the lottery system with the need to discourage more development in Tier I, ensure the mitigation requirements for these properties (in form of lot dedications) are not drastically reduced and to further encourage property owners to dedicate their property for ROGO or sell their property to the State or County for conservation purposes.

*Staff Recommendation:* The staff recommends that Tier I properties be made eligible for entry into the lottery with the following conditions:

- The application shall be a legally platted URM/IS lot that is within 300 feet of FKAA water service and abuts a paved County or State road;
- The applicant must meet a minimum threshold of +22 points;

- The application shall not propose development in a protected species habitat (endangered/threatened and State protected species) depicted on the Threatened and Endangered Plant and Animal Species Maps and Florida Keys Carrying Capacity Study; and,
- As a condition of its issuance, any permit authorized under a lottery allocation award in Tier I, shall be required to meet the mitigation and minimization recommendations identified by the U.S. Fish and Wildlife Service in its technical coordination review.
- No more than 2 allocations in the Upper Keys and 2 allocations in the Lower Keys will be annually awarded under the lottery system to Tier I properties.

*Board Decision:* \_\_\_\_\_

*Retain the provisions establishing the initial share of allocations in the lottery system to 20 percent and the annual increase/decrease to 50% of the previous year's allocation.*

**Pro-** The proposed initial share of 20 percent per year for the lottery system is considered a reasonable, but conservative first step in establishing the system. The system provides flexibility in that the Board may annually raise or lower the share of permits to the lottery system, but any increase or decrease is limited to 50 percent of the previous year's total. If the lottery proves to be unsatisfactory, the Board may amend its Land Development regulations to eliminate its provisions without needing to amend the Comprehensive Plan.

**Con-** The proposed language provides no maximum cap on the number of lottery allocations that may eventually be made available and coupled with the potential for significant changes in the annual number of allocations available in the lottery system, may create undue uncertainty in the construction/development community. In addition, such uncertainty may further dampen the willingness of property owners to dedicate or sell their property for conservation purposes.

*Staff Recommendation:* The staff recommends that a maximum cap of 50% be placed on the number of allocations under a lottery system and the number of allocations in the system can only be annually increased or decreased by 20% of the previous year total rather than 50%.

*Board Decision:* \_\_\_\_\_

#### **Payment for Points under ROGO/NROGO**

*Retain the provision for applicants in ROGO/NROGO to purchase ROGO points as proposed.*

*Background:* The proposed ordinances allow for applicants to purchase up to 3 ROGO points. The fees collected upon issuance of the building permit authorized under a ROGO/NROGO allocation will be placed into a fund for purchase of conservation lands. The basis of the cost for each ROGO point is to be set annually by the Board based on the average assessed value of all privately-owned vacant IS/URM lots divided by four (number of points awarded for dedicated ROGO lot).

**Pro-** The ability to purchase ROGO points is intended to help dampen the rising market value of eligible lots for dedication under ROGO caused by the numbers of lots being dedicated and speculation by real estate investors. As more lots are acquired by the State and County, fewer lots will be available further increasing the market value of these lots. This provision recognizes that even with the number of additional lots eligible for dedication for 1 point, it may be difficult for many individuals to obtain those extra points to make their application competitive enough to receive an allocation award. This option will provide the County with another funding source for its land acquisition efforts. Limiting the number of points that can be purchased is intended to reduce the extra cost and burden placed on the County to identify and negotiate the purchase of conservation property.

**Con-** The most significant disadvantage of the payment for points provision is that it requires the County through the Land Authority to expend its resources on identifying and purchasing property. With land dedication for points, the private market does this reducing acquisition costs for the County.

*Staff Recommendation:* The staff recommends that the payment for points provision be retained; however, the Board may want to consider expanding the number of points that can be purchase to 4, 5, or 6.

*Board Decision:* \_\_\_\_\_

## **New Issues**

### **Existing Non-residential Uses and Tier System**

*Background:* In its further review of the Tier System, the staff recognized that many existing non-residential uses were located in Tier I or II. Unlike residential properties, in order to expand existing non-residential development must go through NROGO to obtain authorization for any additional floor area, which may place an unintended hardship on existing properties. A similar exception is made for existing non-residential development on Big Pine Key.

*Proposed Revision:* Revise the language in NROGO ordinance to permit all existing lawfully established non-residential uses to be assigned +20 points under NROGO; if the existing use is located within a Tier I area, the assignment of the +20 points will be

contingent upon no further clearing of upland native habitat and no addition to and/or expansion of the existing lot or parcel upon the use is situated.

*Staff Recommendation:* The staff recommends approval of the proposed revision.

*Board Decision:* \_\_\_\_\_

### **Additional Points for Market Rate Housing as Part of an Affordable Housing Project**

*Increase the number points awarded in ROGO from +3 to +5 or +6 for market rate units that are part of an affordable housing project.*

*Background:* One of requested revisions to the Tier System that Mr. Ed Swift's presented in his letter (April agenda package) to the Board is to increase under ROGO the number of points that can be awarded to market rate housing as part of an affordable housing project. He is requesting that the number of points be increased from +3 to +5 or +6. Under the County's regulations in projects of five units or more, 20 percent of the units may be deed restricted market rate- restricted to households earning 70 percent or more of annual income in Monroe County.

In reviewing his request, the staff found that the proposed amendments to ROGO calls for +3 points, which is inconsistent with existing regulations in Section 9.5-266. Retaining the +6 points bonus is preferable to only awarding +3 points as the higher point value (higher than a dedicated ROGO lot) more clearly reflects the priorities of the Board to enact measures to promote affordable housing. With the increase in the point value of a dedicated ROGO lot to +4, the +6 points would be a more appropriate score.

*Staff Recommendation:* The staff recommends revising the award from +3 points to +6 points for deed restricted market rate units that are part of an affordable housing project.

*Board Decision:* \_\_\_\_\_

### **CONCLUSION**

Once the Board has provided direction to the staff on revisions to the proposed ordinances, the staff will prepare revised ordinances to be presented to the Board at the June 15 or 16, 2005, public hearing. The County's Special Legal Counsel will be asked to provide a legal memorandum on the defensibility of the final draft ordinances, which will be available prior to the June meeting. At the June meeting, if the Board is amenable, the staff will request that the two resolutions be approved by the Board to transmit the draft ordinances amending the Comprehensive Plan to DCA for review and comment.